FILED
SEP 23 2015
OFFICE OF THE CLERK

No. 14-280

IN THE SUPREME COURT OF THE UNITED STATES

HENRY MONTGOMERY,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

REPLY BRIEF OF PETITIONER

MARK PLAISANCE*
**Counsel of Record*
LINDSAY JARRELL BLOUIN
OFFICE OF THE PUBLIC DEFENDER
EAST BATON ROUGE PARISH
P.O. Box 796
Thibodaux, LA 70302
(985) 227-4588
Plais77@aol.com

SEAN COLLINS
BATON ROUGE CAPITAL CONFLICT OFFICE
525 Florida St., Ste. 310
Baton Rouge, La. 70801
(225) 338-0235

MARSHA LEVICK
EMILY C. KELLER
JEAN W. STROUT
JUVENILE LAW CENTER
1315 Walnut Street
4th Floor
Philadelphia, PA 19107
(215) 625-0551

JEFFREY J. POKORAK
Professor of Law,
Vice Provost for Faculty and Curriculum
SUFFOLK UNIVERSITY
73 Tremont Street
Boston, MA 02108
(617) 573-8030

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES iii

ARGUMENT 1

I. This Court Has Jurisdiction To Consider Mr. Montgomery's Constitutional Claim 1

II. *Miller v. Alabama* Applies Retroactively 2

A. *Miller v. Alabama* Is A Substantive Rule That Applies Retroactively 2

1. *Miller v. Alabama* Expands The Range Of Sentencing Options Available To Mr. Montgomery 2

2. The Major Strands Of Eighth Amendment Precedent Upon Which *Miller* Relies Apply Retroactively 6

a. Rules Prohibiting A Certain Category Of Punishment On A Certain Class Of Defendants Apply Retroactively 7

b. Precedent Suggests That This Court's Capital Cases Requiring Individualized Sentencing Have Been Applied Retroactively 8

c. The Confluence Of Categorical Sentencing Cases And Individualized Sentencing Cases Further

Reinforce *Miller*'s Retroactivity 9

3. Finality And Practicality Concerns Do Not Preclude A Finding of Retroactivity of *Miller* 11

B. This Court Can Consider Mr. Montgomery's Alternative Argument That Miller Is A Watershed Rule Of Procedure 13

CONCLUSION 14

TABLE OF CITED AUTHORITIES

Cases

Alleyne v. United States,
133 S. Ct. 2151 (2013) 7

Atkins v. Virginia,
536 U.S. 304 (2002) 4, 7

Beard v. Banks,
542 U.S. 406 (2004) 3

Black v. Bell,
664 F.3d 81 (6th Cir. 2011) 4

Bobby v. Bies,
556 U.S. 825 (2009) 4

Bousley v. United States,
523 U.S. 614 (1998) 10

Brumfield v. Cain,
135 S. Ct. 2269 (2015) 4

Eddings v. Oklahoma,
455 U.S. 104 (1982) 8

Engle v. Isaac,
456 U.S. 107 (1982) 13

Gilmore v. Taylor,
508 U.S. 333 (1993) 14

Graham v. Collins,
506 U.S. 461 (1993) 3, 14

Graham v. Florida,
560 U.S. 48 (2010) 10, 12

Hooks v. Workman,
689 F.3d 1148 (10th Cir. 2012) 4

Lambrix v. Singletary,
520 U.S. 518 (1997) 3

Lindsey v. Washington,
301 U.S. 397 (1937) 7

Lockett v. Ohio,
438 U.S. 586 (1978) 8

Mata v. Lynch,
135 S. Ct. 2150 (2015) 1

Miller v. Alabama,
132 S. Ct. 2455 (2012) ..... *passim*

Miller v. State,
148 So. 3d 78 (Ala. Crim. App. 2013) 11

O'Dell v. Netherland,
521 U.S. 151 (1997) 3

Penry v. Lynaugh,
492 U.S. 302 (1989) 7

Roper v. Simmons,
543 U.S. 551 (2005) 12

Saffle v. Parks,
494 U.S. 484 (1990) 4

Sawyer v. Smith,
497 U.S. 227 (1990) 3

Schriro v. Summerlin,
542 U.S. 348 (2004) ..... *passim*

State v. Tate,
130 So. 3d 829 (La. 2013) 13

Sullivan v. Florida,
560 U.S. 181 (2010) 12

Sullivan v. Jones,
165 So. 3d 26 (Fla. Dist. Ct. App. 2015) 12

Sumner v. Shuman,
483 U.S. 66 (1987) 9

Teague v. Lane,
489 U.S. 288 (1989) ..... *passim*

Woodson v. North Carolina,
428 U.S. 280 (1976) 8, 9

Yee v. City of Escondido,
503 U.S. 519 (1992) 14

Other Authorities

Merriam-Webster Dictionary, *available online at*
http://www.merriam-webster.com/dictionary 5

ARGUMENT

I. This Court Has Jurisdiction To Consider Mr. Montgomery's Constitutional Claim

Both Petitioner Montgomery and Respondent State of Louisiana agree that this Court has jurisdiction to hear this case. *See* Resp't Br. 11 ("It is undisputed that the Louisiana Supreme Court relied solely on the *Teague* framework in determining that *Miller* is non-retroactive on collateral review."). Both Parties are joined by the Solicitor General of the United States in recognizing that well-established principles governing jurisdiction in this Court allow for consideration of this matter. *See* U.S. Amicus Curiae Br. Supp. Pet'r 25-34.

The claim presented by Mr. Montgomery is a federal constitutional claim, namely, whether continuing to hold Mr. Montgomery in prison pursuant to a mandatory sentence of life without parole is a violation of this Court's ruling that such sentences imposed on juveniles violate the Eighth Amendment of the United States Constitution. *See Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).[1] Both the State of Louisiana, represented by its Attorney General, and Petitioner stress that the Louisiana Supreme Court's ruling denying Mr. Montgomery relief is based entirely on its application of this Court's

---

[1] This Court's recent ruling in *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) applies equally to Mr. Montgomery's claim: "The jurisdictional question (whether the court has power to decide if [retroactive application] is proper) is of course distinct from the merits question (whether [retroactive application] is proper" (substituting "retroactive application" for "tolling").

federal retroactivity analysis. Court-Appointed Amicus argues that the state court's retroactivity determination is a matter of state, not federal, law; he therefore argues that this Court lacks jurisdiction. But, as the State and the United States conclude, a federal issue is unquestionably presented here: whether the Louisiana Supreme Court correctly applied the federal Teague standards that it incorporated into its law. That presents a federal issue over which this Court has jurisdiction, even if, on remand, Louisiana could choose to deviate from federal law and adopt a state retroactivity standard. *See* U.S. Amicus Curiae Br. Supp. Pet'r 25-33; Resp't Br. 6-11.

II. *Miller v. Alabama* Applies Retroactively

A. *Miller v. Alabama* Is A Substantive Rule That Applies Retroactively

Pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), this Court has held that "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). The new rule announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) applies retroactively because it is a substantive rule rather than, as urged by Respondent, a mere procedural change. Resp't Br. 16-41.

1. *Miller v. Alabama* Expands The Range Of Sentencing Options Available To Mr. Montgomery

Respondent argues that, because this Court has held that certain "new rules" in capital sentencing

cases are "procedural," the new rule in *Miller* should not be applied retroactively. Resp't Br. 24-27. However, in all of the cases cited by Respondent, the original sentencing options – death or one other mandatory alternative – remained unchanged by this Court's ruling. The new rules at issue in those cases concerned who made the sentencing decision; what factors were weighed at sentencing; what information a sentencer must consider prior to imposing a sentence; or the degree of unanimity required to impose a sentence.[2] *See O'Dell v. Netherland*, 521 U.S. 151, 155 (1997) (involving a rule that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, the Due Process Clause of the Fourteenth Amendment requires that the sentencing jury be informed that the defendant is not eligible for parole") (internal citation omitted); *Beard v. Banks*, 542 U.S. 406, 408 (2004) (involving a rule that invalidated capital sentencing schemes that required juries to disregard mitigating factors that were not found unanimously); *Lambrix v. Singletary*, 520 U.S. 518, 521 (1997) (involving a rule precluding capital sentencers from giving weight to invalid aggravating circumstances); *Sawyer v. Smith*, 497 U.S. 227, 233 (1990) (involving a rule "that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere"); *Graham v. Collins*, 506 U.S. 461, 478 (1993) (involving a rule that would require "special jury instructions

---

[2] This Court's mandatory death penalty decisions are discussed separately, *infra*, at Section II.A.2.b.

concerning [a capital defendant's] mitigating evidence of youth, family background, and positive character traits"); *Saffle v. Parks*, 494 U.S. 484, 486 (1990) (involving a rule that would preclude an instruction that a sentencing jury must "avoid any influence of sympathy"). None of the cases cited required states to expand the range of sentencing options for the defendant.

Miller is fundamentally different from the "procedural" cases cited by Respondent. In *Miller*, this Court *mandated* an expanded range of available sentencing options, rather than modifying an existing sentencing process with no impact on the range of sentencing possibilities.[3]

---

[3] Though *Miller* requires states to create a "process" to ensure juveniles convicted of homicide offenses receive individualized sentencing hearings, the fact that a new rule requires new "processes" does not necessitate a finding that the new rule is "procedural." For example, in response to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) prohibiting the execution of intellectually disabled persons, states needed to establish a "process," i.e, new procedures or hearings, to determine whether a defendant was "mentally retarded" within the meaning of *Atkins*. *See Bobby v. Bies*, 556 U.S. 825, 831 (2009) ("Our opinion [in *Atkins*] did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall [within *Atkins*' compass].' We 'le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction.'") (quoting *Atkins*, 536 U.S. at 317); *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2274 (2015) (discussing the processes Louisiana put in place to implement the new rule in *Atkins*). In spite of the fact that *Atkins* required states to develop new processes, the substantive nature of the ruling required that it be applied retroactively. *See, e.g., Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (applying *Atkins* retroactively); *Black v. Bell*, 664 F.3d

This distinction between a new rule that modifies existing procedures and a new rule that alters and expands the range of available sentences is key to the *Teague* analysis in this case. *Miller* fundamentally reshaped juvenile homicide sentencing. Failing to apply *Miller* retroactively creates a near-certain risk that the vast majority of juveniles sentenced to mandatory life without parole prior to this Court's ruling are serving unconstitutionally disproportionate punishments. *See Miller*, 132 S. Ct. at 2469 (mandatory life without parole for juveniles "poses too great a risk of disproportionate punishment"). *Miller* therefore is substantive and must apply retroactively. *See Summerlin*, 542 U.S. at 352.

Though Respondent argues that this Court should not "extend" *Teague*'s exceptions, *see* Resp't Br. 28-32, applying *Miller* retroactively is fully consistent with *Teague* and *Summerlin*. In *Summerlin*, the Court stated that "rules that regulate only the *manner of determining* the defendant's culpability are procedural." 542 U.S. at 353. The *Miller* rule cannot be classified as procedural under that definition. The "manner of determining" describes the "way that something is done or happens." *See* Merriam-Webster Dictionary, *available online at* http://www.merriam-webster.com/dictionary/manner (defining "manner"). This definition applies, for example, to the type of evidence that is admissible or the burden of proof: those matters concern the way a sentence is imposed. It does not apply to a rule mandating newly

---

81 (6th Cir. 2011) (same). Therefore, in determining whether a new rule is "substantive" or "procedural," the fact that new procedures or processes are required to implement the rule is not dispositive.

available sentencing options. But the *Miller* rule does just that: it provides a substantive opportunity for an entirely different judgment – a lesser sentence that did not exist at the time of the original sentencing. That cannot be described as purely "procedural" under *Summerlin*'s approach.

Moreover, *Summerlin* provides examples, but not an exclusive list of rules considered substantive. *See Summerlin*, 542 U.S. at 351-52 ("New *substantive* rules generally apply retroactively. *This includes* decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish") (internal citations omitted) (second emphasis added). Applying *Miller* retroactively is not contrary to this Court's jurisprudence.

2. The Major Strands Of Eighth Amendment Precedent Upon Which *Miller* Relies Apply Retroactively

In reaching its holding, *Miller* relied on two strands of Eighth Amendment precedent: "[t]he first [ ] adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty"; the second "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death." *Miller*, 132 S. Ct. at 2463-64. Both of these strands apply retroactively and so, too, should *Miller*.

a. Rules Prohibiting A Certain Category Of Punishment On A Certain Class Of Defendants Apply Retroactively

Respondent does not dispute that the first strand of precedent upon which *Miller* relies – rules that prohibit a certain category of punishment for a certain class of defendants – are substantive. Resp't Br. 16. *See also Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002) (finding that substantive rules include rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense."). Instead, Respondent contends that "mandatory life without parole" is not a "category of punishment" because it refers to the "manner" of punishment, not the "category" of punishment. Resp't Br. 17.

This Court has held that "mandatory" penalties are different in nature and severity than discretionary penalties. *See Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) ("Mandatory minimum sentences increase the penalty for a crime."); *see also Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (holding that applying a *mandatory* maximum sentence to a defendant would violate the *ex post facto* clause, noting that "[r]emoval of the possibility of a sentence of less than fifteen years operates to their detriment in the sense that *the standard of punishment adopted by the new statute is more onerous than that of the old.*") (emphasis added). Because a mandatory life without parole sentence is more severe than a discretionary life without parole

sentence – and therefore qualitatively different – "mandatory life without parole" is a distinct category of punishment. The new rule announced in *Miller* is substantive and must apply retroactively.

b. Precedent Suggests That This Court's Capital Cases Requiring Individualized Sentencing Have Been Applied Retroactively

Respondent argues that no U.S. Supreme Court case law establishes that the second strand of precedent upon which *Miller* relies – this Court's capital cases requiring individualized sentencing – must apply retroactively. Resp't Br. 27.[4] Most analogously, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) held the mandatory death penalty unconstitutional for certain offenses, just as *Miller* held mandatory life without parole sentences unconstitutional for juvenile offenders.[5] The lack of U.S. Supreme Court precedent specifically addressing

---

[4] Since *Woodson v. North Carolina*, 428 U.S. 280 (1976) pre-dated *Teague*, the Court never directly applied the *Teague* analysis.

[5] Unlike *Woodson*, this Court's other individualized sentencing cases (including *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)) did not address *mandatory* death penalty statutes; instead, those cases addressed sentencer's ability to consider mitigating factors, without changing the range of available sentencing options. *See, e.g.*, *Lockett*, 438 U.S. at 597; *Eddings*, 455 U.S. at 117. In *Lockett*, for example, Ohio failed to allow consideration of all of a defendant's mitigation evidence. 438 U.S. at 597. *Lockett* could be characterized as a "procedural" rule that is not retroactive because it did not expand outcomes; *Miller* does, and is therefore substantive. Only *Woodson*, like *Miller*, expanded the sentencing options available to defendants.

Woodson's retroactivity is unsurprising since states uniformly applied *Woodson* retroactively. *See Sumner v. Shuman*, 483 U.S. 66, 72 n. 2 (1987) (finding that only three individuals in the country were still serving mandatory death sentences, all based on statutes at issue in *Shuman*, in which individuals were convicted of murder while serving life sentences).

The fact that states universally applied *Woodson* retroactively suggests that the substantive nature of the ruling was self-evident; once this Court held that mandatory death sentences violated the Eighth Amendment, states understood that carrying out the execution of individuals who received these mandatory death sentences would be unconstitutional. The same result should apply here as this Court has found that life without parole for juveniles is "akin to the death penalty." *Miller*, 132 S. Ct. at 2466.

c. The Confluence Of Categorical Sentencing Cases And Individualized Sentencing Cases Further Reinforce *Miller*'s Retroactivity

Even if this Court disagrees that new rules striking down the mandatory death penalty must apply retroactively under *Teague*, the confluence of the two separate strands of precedent relied upon in *Miller* provides even stronger support for *Miller*'s retroactive application than the individualized capital sentencing cases alone. In this Court's cases striking the mandatory death penalty, there was no finding

that those subjected to the mandatory sentence were, as a class, less culpable and less deserving of the harshest available sentence. In contrast, *Miller* found that juvenile offenders have a "diminished culpability" and "they are less deserving of the most severe punishments." *Miller*, 132 S. Ct. at 2464 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).[6]

In light of juvenile's diminished culpability and increased prospects for rehabilitation, this Court concluded that appropriate occasions for the imposition of juvenile life without parole would be "uncommon," *Miller*, 132 S. Ct. at 2469, and that only the very rare juvenile homicide offender should receive a life without parole sentence. *See Miller*, 132 S. Ct. at 2469 (noting the sentence should be imposed on only the "rare juvenile offender whose crime reflects irreparable corruption") (internal quotation omitted). Therefore, even more than the individualized sentencing cases, failing to apply *Miller* retroactively "'necessarily carr[ies] a significant risk that a defendant' faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. 348 at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). *See Miller*, 132 S. Ct. at 2469 (mandatory life without parole for juveniles "poses too great a risk of disproportionate punishment").

---

[6] Notably, *Miller* "require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 132 S. Ct. at 2469. When this Court makes a certain fact essential to the imposition of the harshest available sentence (here, a rejection of youth as a mitigator), that rule is necessarily substantive. *Summerlin*, 542 U.S. at 354.

3. Finality And Practicality Concerns Do Not Preclude A Finding of Retroactivity of *Miller*

Emphasizing the importance of finality and concerns with the passage of time between conviction and resentencing, Respondent argues that the retroactive application of *Miller* would unduly burden the criminal justice system. Resp't Br. 34-36.

While the passage of time necessarily creates some obstacles to locating records, evidence, and witnesses, requiring individualized sentencing hearings after years or even decades have passed since the initial conviction is hardly unusual. *Miller*, for example, indisputably applies to cases on direct review at the time of the decision, including Petitioner Evan Miller's 2003 homicide case. *Miller*, 132 S. Ct. at 2462. In Mr. Miller's case, the Alabama courts remanded Mr. Miller's case for a new sentencing hearing *a decade after the original offense. See Miller v. State*, 148 So. 3d 78 (Ala. Crim. App. 2013). Moreover, as *Amici* Former Juvenile Court Judges describe, states around the country have readily applied *Miller* retroactively and held individualized resentencing hearings, even in cases that were decades old. Former Juvenile Court Judges Amicus Br. 11-16.

Similarly, after this Court in *Graham* held that life without parole is unconstitutional for juvenile non-homicide offenders, courts held resentencing hearings – often decades after the initial crime and conviction – to determine the appropriate sentence for this group of juvenile offenders. For example, Joe Sullivan, the

petitioner in the companion case to *Graham*,[7] was convicted in 1989 for nonhomicide offenses and did not receive a resentencing hearing until more than two decades later. *See Sullivan v. Jones*, 165 So. 3d 26, 27-28 (Fla. Dist. Ct. App. 2015), *reh'g denied* (June 12, 2015). *See also* Former Juvenile Court Judges Amicus Br. at 16-19 (describing post-*Graham* resentencings).

Importantly, trials are backward-looking fact-finding proceedings; sentencing hearings have an essential forward-looking component. Specifically, in recent juvenile sentencing cases, this Court's Eighth Amendment holdings have relied upon juvenile offenders' unique capacity for rehabilitation. *See Miller*, 132 S. Ct. at 2468 (mandatory life without parole "disregards the possibility of rehabilitation even when the circumstances most suggest it"); *Graham*, 560 U.S. at 74 (noting juvenile offender's "capacity for change"); *Roper v. Simmons*, 543 U.S. 551, 570 (2005) ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed"). With this concern for rehabilitation at the center of these cases, the passage of time between the juvenile offense and a resentencing hearing may provide evidence of *real* rehabilitation (or its lack), rather than the mere *possibility* of rehabilitation.

Mr. Montgomery is serving an unconstitutional sentence and, like juveniles convicted of homicide offenses today or juvenile offenders whose cases were

---

[7] *Sullivan* was argued the same day as *Graham*, *see Graham*, 560 U.S. at 76, but dismissed as improvidently granted. *Sullivan v. Florida*, 560 U.S. 181, 181-82 (2010).

on direct review in 2012, is entitled to an individualized sentencing hearing in which his reduced culpability is considered as a mitigating factor. The passage of time – and the fact that Mr. Montgomery has been incarcerated for more than half a century – should not be used to justify leaving him to die in prison while serving an unconstitutional sentence. The principles of finality and comity "must yield to the imperative of correcting a fundamentally unjust incarceration." *Engle v. Isaac*, 456 U.S. 107, 135 (1982).

B. This Court Can Consider Mr. Montgomery's Alternative Argument That *Miller* Is A Watershed Rule Of Procedure

This Court can consider Petitioner's alternative argument that *Miller* is a watershed rule of procedure. The issue of whether *Miller* is a watershed rule is addressed at length as part of the *Teague* analysis in the state court decision relied upon as the sole basis for the Louisiana Court's opinion below. *See State v. Tate*, 130 So. 3d 829, 838-41 (La. 2013), *cert. denied*, 134 S. Ct. 2663 (2014). The dissent in *Tate* specifically found that *Miller* is a watershed rule. *Id.* at 847 (Johnson, C.J., dissenting). This issue has also been briefed by the parties. Pet'r Br. 28-30; Resp't Br. 42-43.

Watershed rules are those "implicating the fundamental fairness and accuracy of the criminal proceeding." *Summerlin*, 542 U.S. at 352 (internal quotations omitted). Because, by definition, a watershed rule of procedure must implicate

fundamental fairness and accuracy, any rule this Court found to be watershed would necessarily have some substantive dimensions. *See Gilmore v. Taylor*, 508 U.S. 333, 345 (1993) (describing as "watershed" rules "that 'small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty'") (quoting *Graham v. Collins*, 506 U.S. at 478) (internal quotation marks omitted). Since any rule that is "implicit in the concept of ordered liberty" is in part substantive, the question of whether *Miller* is a watershed rule that applies retroactively is fairly included in the question presented.

Even were this Court to conclude that the issue is not clearly included in the question presented, the interests of judicial economy are best served by considering the question in this case given the close nexus between the "substantive" and "procedural" analysis in *Teague* and the fact that the issue has been fully briefed. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (finding that courts can consider questions not explicitly listed in the questions presented when fairly included in the petition or "where reasons of urgency or of economy suggest the need to address" the question).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

MARK PLAISANCE*
*Counsel of Record
LINDSAY JARRELL BLOUIN
OFFICE OF THE PUBLIC DEFENDER
EAST BATON ROUGE PARISI
P.O. Box 796
Thibodaux, LA 70302
(985) 227-4588
Plais77@aol.com

SEAN COLLINS
BATON ROUGE CAPITAL CONFLICT OFFICE
525 Florida St., Ste. 310
Baton Rouge, La. 70801
(225) 338-0235

MARSHA LEVICK
EMILY C. KELLER
JEAN W. STROUT
JUVENILE LAW CENTER
1315 Walnut Street
4th Floor
Philadelphia, PA 19107
(215) 625-0551

JEFFREY J. POKORAK
Professor of Law,
Vice Provost for Faculty and Curriculum
SUFFOLK UNIVERSITY
73 Tremont Street
Boston, MA 02108
(617) 573-8030

Counsel for Petitioner

September 23, 2015

REPLY BRIEF

No. 14-280

FILED
SEP 23 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HENRY MONTGOMERY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

REPLY BRIEF OF COURT-APPOINTED *AMICUS CURIAE* ARGUING AGAINST JURISDICTION

STUART R. LOMBARDI
JONATHAN D. WAISNOR
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019

RICHARD D. BERNSTEIN
Counsel of Record
FRANK SCADUTO
JOANNE T. PEDONE
KYLE A. MATHEWS
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006
(202) 303-1000
rbernstein@willkie.com

Counsel for Amicus Curiae

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.. i

TABLE OF CITED AUTHORITIES ii

ARGUMENT..... 3

A. The Court Should Not Create Jurisdiction To Review A State Court's Use Of Non-Binding Federal Precedents. 3

B. The *Teague* Exceptions Are Not Binding In State Collateral Review Proceedings..... .14

CONCLUSION .. .. .23

TABLE OF CITED AUTHORITIES

Page

Cases

Am. Trucking Ass'ns, Inc. v. Smith,
496 U.S. 167 (1990) 7, 8, 19, 20

Basic Inc. v. Levinson,
485 U.S. 224 (1988) 9

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 22

Coleman v. Thompson,
501 U.S. 722 (1991) 5, 10

Cone v. Bell,
556 U.S. 449 (2009) 13

Cty. of Allegheny v. ACLU,
492 U.S. 573 (1989) 21

Danforth v. Minnesota,
552 U.S. 264 (2008) ..... *passim*

Dixon v. Thompson,
429 U.S. 1080 (1977) 15

Dura Pharm., Inc. v. Broudo,
544 U.S. 336 (2005) 9

Ex parte McCardle,
74 U.S. (7 Wall.) 506 (1868) 11

Cited Authorities

Page

Florida v. Powell,
559 U.S. 50 (2010) 11

Griffith v. Kentucky,
479 U.S. 314 (1987) 17, 18

Harper v. Va. Dep't of Taxation,
509 U.S. 86 (1993) 19

Herb v. Pitcairn,
324 U.S. 117 (1945) 6

Holmes v. Sec. Inv'r Prot. Corp.,
503 U.S. 258 (1992) 9

Johnson v. Fankell,
520 U.S. 911 (1997) 15

Kamen v. Kemper Fin. Servs.,
500 U.S. 90 (1991) 8

Kuhlmann v. Wilson,
477 U.S. 436 (1986) 18

Linkletter v. Walker,
381 U.S. 618 (1965) 10, 18

Mackey v. United States,
401 U.S. 667 (1971) 18

Cited Authorities

Page

Merrell Dow Pharm. Inc. v. Thompson,
478 U.S. 804 (1986).... 7

Michigan v. Long,
463 U.S. 1032 (1983). 6, 11

Miller v. Alabama,
567 U.S. ___, 132 S. Ct. 2455 (2012) ..... *passim*

Mobil Oil Expl. & Producing Se., Inc. v. United States,
530 U.S. 604 (2000) 9-10

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012).. 14

Nitro-Lift Techs., L.L.C. v. Howard,
133 S. Ct. 500 (2012). 11

Ohio v. Reiner,
532 U.S. 17 (2001). 7

Schweiker v. Chilicky,
487 U.S. 412 (1988)..... .... .17

Standard Oil Co. v. Johnson,
316 U.S. 481 (1942)..... 7

State ex rel. Taylor v. Whitley,
606 So. 2d 1292 (La. 1992).. 5

Cited Authorities

Page

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 11

Teague v. Lane,
489 U.S. 288 (1989) ..... *passim*

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.,
467 U.S. 138 (1984) 6-7

United States v. Donnelly,
397 U.S. 286 (1970) 20

Statutes

28 U.S.C. § 1257(a) ..... *passim*

28 U.S.C. § 1291 8

28 U.S.C. § 2241 15

28 U.S.C. § 2241(b) 15

28 U.S.C. § 2254 15

28 U.S.C. § 2254(a) 21

28 U.S.C. § 2254(d) 13

28 U.S.C. § 2254(d)(1) 12

Cited Authorities

Page

42 U.S.C. § 1983... ..... .17

Enforcement Act of 1871, Ch. 22, 17 Stat. 13..... .17

Habeas Corpus Act of 1867, Ch. 28, 14 Stat. 385... ..17

Other Authorities

Sup. Ct. R. 20-4(a)... 15

16B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 4006 (3d ed. 2012) 4

16B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 4031 (3d ed. 2012) 7

The opening brief of the Court-Appointed *Amicus* ("Opening Br.") established three propositions demonstrating why the Court lacks jurisdiction in this case to decide the issue of whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012) (the "*Miller* retroactivity issue"). First, it is not enough for this Court to have appellate jurisdiction over some issue in this *case*—the Court's jurisdiction must also extend to the *Miller* retroactivity issue. Second, that the Louisiana Supreme Court used *non*-binding federal precedents for guidance does not provide a basis for extending this Court's jurisdiction to deciding the *Miller* retroactivity issue in this case. Third, this Court's appellate jurisdiction would extend here to the *Miller* retroactivity issue only if the *Teague* exceptions were binding in state collateral review proceedings on the retroactivity of new constitutional rules to final convictions. They are not.

No one disputes the first proposition. The parties, as well as certain *amici curiae*, dispute the second proposition. And Petitioner and certain *amici* dispute the third proposition. Accordingly, this reply focuses on the disputed second and third propositions.

A. As reflected in the plain language of 28 U.S.C. § 1257(a), this Court has appellate jurisdiction over state court decisions in order to enforce the Supremacy Clause—that is, to ensure that state courts do not deny a "right" conferred by federal law. When federal law is not binding, there is no *federal right* and thus no basis for this Court to correct a state court's reading of merely persuasive non-binding federal cases.

In pertinent part, § 1257(a) limits this Court in this case to deciding if Petitioner was denied a "title, right, privilege, or immunity [that] is specially set up or claimed under the Constitution or the treaties or statutes of ... the United States." It would contravene the language and purpose of § 1257(a) for this Court to extend jurisdiction in this case to the *issue* of the proper scope of federal law without first deciding whether federal retroactivity law in fact creates a binding federal right in state collateral review courts.

The United States and Respondent urge the Court to ignore this predicate jurisdictional question. Instead, they argue that it is sufficient for this Court to exercise appellate jurisdiction if a state court potentially misreads non-binding federal precedents. They argue that this admittedly novel expansion of this Court's jurisdiction is warranted to avoid the "difficult" constitutional issue of whether the *Teague v. Lane*, 489 U.S. 288 (1989), exceptions are binding on state collateral review courts. *E.g.*, United States Br. at 33. But they do not cite any precedent where this Court *expanded* its limited jurisdiction over state courts to avoid a constitutional question.

The parties and their *amici* seek an unprecedented expansion of this Court's jurisdiction over state courts that will extend to myriad state criminal *and* civil cases. Recognizing what this brief will call "Montgomery" jurisdiction would be an open call to the Supreme Court bar to flood this Court with certiorari petitions seeking review of state court decisions that cite federal cases as persuasive authority on procedure, evidence, and substantive issues from materiality and causation to anti-competitive effect, and so on. The Court inevitably would

review some state court cases under such newly minted jurisdiction, thus encouraging even more petitions.

B. There is thus no sound reason to avoid a very narrow constitutional question that the rationale of *Danforth v. Minnesota*, 552 U.S. 264 (2008), already answers: the Constitution does not require state collateral review courts to provide a mirror retroactivity remedy to the one Congress has provided under the federal habeas statute for federal courts only. *Danforth* held that the basis for the *Teague* standards is the federal habeas statute, not the Constitution. *Id.* at 278-79. As the federal habeas statute empowers only federal habeas courts, federal law does not require state collateral review courts to mirror the *Teague* standards.

As to the specific "*Miller* retroactivity issue," as the United States notes, that issue can be decided this Term by granting certiorari in *Johnson v. Manis*, *petition for certiorari pending* (U.S. June 29, 2015) (No. 15-1).[1] *Johnson v. Manis* raises the *Miller* retroactivity issue in the context where the *Teague* exceptions unquestionably govern—a federal habeas proceeding.

ARGUMENT

A. The Court Should Not Create Jurisdiction To Review A State Court's Use Of Non-Binding Federal Precedents.

This Court has no jurisdiction in this case to decide how *Teague* applies to *Miller* without first deciding that

1. Filed as *Johnson v. Ponton*.

the *Teague* exceptions are binding in state court collateral review proceedings.[2] It is insufficient that the Louisiana Supreme Court used non-binding federal precedents as a guide for "its law," United States Br. at 31. None of the justifications offered for such an unprecedented expansion of the Court's appellate jurisdiction withstands scrutiny.

1. Petitioner argues that 28 U.S.C. § 1257(a) confers jurisdiction over the *Miller* retroactivity issue in this case even if state law governs retroactivity in state collateral review courts. Pet. Br. at 37-40. No one disputes that § 1257(a) gives the Court appellate jurisdiction to decide in this case whether federal law is binding. This is because Petitioner claimed in his certiorari petition and below that federal law *requires* state courts on collateral review to apply *Miller* retroactively. *See* Opening Br. at 21. However, as its language makes plain, § 1257(a) limits the Court in this case to deciding whether the Louisiana Supreme Court denied Petitioner a "title, right, privilege, or immunity [that] is specially set up or claimed under the Constitution or the treaties or statutes of ... the United States." 28 U.S.C. § 1257(a).[3]

Section 1257(a) would be a timid sentinel if this Court's limited appellate jurisdiction extended to deciding an

---

2. By "binding," this brief and our Opening Brief mean that federal law *requires* a state court to apply federal law.

3. "Under long-settled doctrine, this statutory designation [§ 1257(a)] of cases eligible for review is an implicit denial of jurisdiction in all other cases that might fall within the constitutional description of the Supreme Court's appellate jurisdiction." 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4006, at 176 & n.13 (3d ed. 2012) ("Wright") (citing cases).

issue governed by state law because a state court gave content to state law by voluntarily choosing to be guided by *non*-binding federal precedents. A *non*-binding federal precedent can no more create a "title, right, privilege, or immunity ... under" federal law than could a non-binding resolution of Congress. Surely, if Petitioner had never argued in his petition that federal law was binding, but instead had argued *only* that the Louisiana Supreme Court misread *non*-binding federal precedents, this Court would have no basis for appellate jurisdiction over the case under the plain language of § 1257(a).

As Petitioner and *amicus* Center on the Administration of Criminal Law ("CACL") recognize, the evident purpose of § 1257(a) is to enable the Court to enforce the Supremacy Clause. *See* Pet. Br. at 38-39; CACL Br. at 10-12. But there is no such thing as supreme but non-binding federal law. In exercising its limited jurisdiction under § 1257(a), this Court is not like an author's blog that corrects every misinterpretation by someone else of anything the author ever wrote. Rather, this Court's jurisdiction under § 1257(a) over state courts extends to enforcing a title, right, privilege, or immunity that federal law makes binding in that state court case.

2. As the United States admits: "In a typical *Long* case, federal law applies of its own force; here, Louisiana chose to apply federal law." United States Br. at 7. Specifically, in *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992), the Louisiana Supreme Court stated that "we are not bound to adopt the *Teague* standards."[4]

---

4. No one disagrees that under *Coleman v. Thompson*, 501 U.S. 722, 735 (1991), the summary dismissal by the Louisiana Supreme Court in this case could not itself satisfy *Long*'s first

Although the United States admits that the jurisdictional issue in this case therefore "presents a novel question under *Long*," it argues that the Court should exercise jurisdiction over the *Miller* retroactivity issue based on the Court's purported ability "to review certain embedded federal-law issues in state cases because those cases raise federal questions." United States Br. at 27-28. According to the United States, this Court's jurisdiction to "correct" a state court's "mistaken understanding of federal law" should apply to non-binding federal precedents. *Id.* at 7.

But the United States never explains how correcting a misinterpretation of non-binding federal precedents fits within the limitation of § 1257(a) under which this Court decides whether a state court denied a "right" (or title, privilege, or immunity) "*under*" federal law. As the Court has emphasized, its appellate jurisdiction over state court decisions is limited to "correct[ing] them *to the extent* that they incorrectly adjudge *federal rights*." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (emphasis added). Thus, the Court has no appellate jurisdiction over an issue in state court where "federal cases are being used only for the purpose of guidance." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

As the United States frankly concedes, in every case it relies upon, federal law "independent[ly] governed." United States Br. at 31. That is, in those cases, both the state court and this Court addressed the scope of *binding* federal law. Thus, in *Three Affiliated Tribes of*

---

predicate condition. So the Court must look to the prior Louisiana decisions. *See* Opening Br. at 12-13.

Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984), the Court first decided that binding federal law did not "preclude[] the state courts from asserting jurisdiction over petitioner's claim" in that case. *Id.* at 147. Then, the Court exercised its jurisdiction over circumstances when a state court "may construe state law narrowly to avoid a perceived conflict with federal statutory or constitutional ***requirements***." *Id.* at 152 (emphasis added). The Court remanded because the state court had suggested it "regarded federal law as an ***affirmative bar***" to the state court's jurisdiction. *Id.* at 152, 155 (emphasis added). *See also Standard Oil Co. v. Johnson*, 316 U.S. 481, 483 (1942) ("the relationship between post exchanges and the government of the United States ... is ***controlled*** by federal law") (emphasis added); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 816 & n.14 (1986) (dictum) (this Court would have appellate jurisdiction if a state court rejected a preemption defense based on a federal statute); *Ohio v. Reiner*, 532 U.S. 17, 20-21 (2001) (state court made "determination of federal law" that petitioner "did not have a valid Fifth Amendment privilege"). *Cf.* Wright, § 4031, at 550-51 (suggesting that a state court's "mistaken conclusions of federal law" only "justify Supreme Court review after a completed state court decision has ***made it clear*** that federal questions ***control*** the outcome") (emphasis added).

Although § 1257(a) is 226 years old, neither the United States nor anyone else cited a single case where this Court said it was skipping over whether federal law was binding in order to explicate the scope of federal law. Petitioner and certain *amici* (but not the United States) cite the plurality in *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990), but it is the opposite of such a

decision. The plurality stated that it was not interpreting the scope of "federal law unnecessarily" because in a state court civil action pending on direct review, "whether a constitutional decision of this Court is retroactive ... is a matter of federal law" as "federal law sets certain minimum requirements that States must meet." *Id.* at 177-79. In contrast, here the parties and their *amici* ask this Court to decide the *Miller* retroactivity issue in this case *without* first deciding whether retroactivity in state collateral review courts "is a matter of federal law."

The parties and their *amici* also ignore this Court's prior holding that even under a federal appellate court's far *broader* jurisdiction under 28 U.S.C. § 1291 over appeals from federal district courts, a federal appellate court is "not free" to decide the scope of federal law unless it first rules that federal law governs, regardless of any waiver by the parties. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991); Opening Br. at 17-18. The justification for an antecedent jurisdictional requirement that federal law must govern before this Court opines upon the scope of federal law is at its strongest under the much narrower language of § 1257(a).

The United States concedes that this Court would not have jurisdiction to correct a state court's misunderstanding of non-binding federal precedents if the question at issue "could be given content through state decisions." United States Br. at 32. But that is *this case* if the Louisiana Supreme Court was correct that federal law is not binding. As the United States admits, "[o]n remand, the state court *could* abandon *Teague* as a matter of state law and apply a different standard, subject to federal constitutional review." *Id.* at 28 n.11 (first emphasis added).

Neither the United States nor anyone else articulates any principled limit if jurisdiction under § 1257(a) extends to "correct[ing a state court's] mistaken understanding of [non-binding] federal law." *Id.* at 7. The United States notes that the Louisiana Supreme Court "relied solely on federal precedents." *Id.* at 27. But the United States never explains how its rationale that this Court has jurisdiction to correct a state court's misunderstanding of non-binding federal precedents would not apply to a state court decision that, for example, interprets five federal precedents and two precedents from another state. Or, where a single state judge's concurrence was necessary for the majority and only it relied exclusively on federal precedents.

The proposed expansion of the Court's appellate jurisdiction resulting from "Montgomery" jurisdiction would reach myriad types of civil and criminal cases and issues where state courts rely on non-binding federal precedents.[5] In addition to federal evidentiary and procedural precedents, federal precedents address numerous substantive issues that routinely arise in state court cases. For example, this Court has decided various tort issues, including proximate causation, *see Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (1934 Act); *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 265-68 (1992) (RICO), and materiality, *see Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (1934 Act). Likewise, the common law of federal contracts adopts and applies the Restatement (Second) of Contracts. *See Mobil Oil*

5. To start, a majority of states use the *Teague* standards. United States Br. at 33 n.12. This Court would thus be creating appellate jurisdiction over all these cases because they will all cite federal precedents.

Expl. & Producing Se., Inc. v. United States, 530 U.S. 604, 608 (2000). Given the broad reach of persuasive but non-binding federal precedents, adopting "Montgomery" jurisdiction would "greatly and unacceptably expand the risk" that this Court's appellate jurisdiction over state courts would be used to decide issues governed by state law. *Coleman v. Thompson*, 501 U.S. 722, 737-38 (1991).

Congress did not write § 1257(a) to include "whenever a state court relies on federal precedents." Accordingly, this Court should continue to limit its § 1257(a) jurisdiction to deciding issues where federal law is binding.

3. If this Court recognized jurisdiction to correct a state court's misunderstanding of non-binding federal precedents, this would also create a very strange kind of jurisdiction. Until this case, this Court's jurisdiction has always empowered the Court to exercise two options when assessing a federal standard: (a) usually, to explicate and apply the existing standard *or* (b) less often, to replace the existing federal standard with a different, better standard. *Teague* itself did the latter when it jettisoned the prior standard set forth in *Linkletter v. Walker*, 381 U.S. 618 (1965).

The rationale for "Montgomery" jurisdiction, however, is to assist the state court by correcting the state court's misreading of existing federal precedents. *See* United States Br. at 7. In a case of "Montgomery" jurisdiction, that rationale would nullify any option to change the existing standard, as such replacement would not correct the state court's misunderstanding of existing federal precedents. The resulting truncated jurisdiction would offend the "long and venerable" line of cases holding that

jurisdiction confers "'power to declare the law,'" whatever the law may be. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 101-02 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)).

4. Petitioner and certain *amici*, but *not* the United States, argue that this Court's adequate and independent state ground precedents extend the Court's appellate jurisdiction to where a state court relied on non-binding federal cases. Pet. Br. at 40-45; Equal Justice Initiative ("EJI") Br. at 24-30; CACL Br. at 7-12. But the first requirement in *Michigan v. Long* requires that a state court have relied on binding federal law, *supra*, at 6, and only the second requirement addresses the absence of an adequate and independent state ground. That first requirement is not satisfied here because the Louisiana Supreme Court has relied on what it has written were *non*-binding federal precedents. *Supra*, at 5.[6] The adequate and independent state ground prong cannot come into play because the *first* requirement of *Long* is unsatisfied.

If the *Teague* exceptions are not binding federal law in state court, then there can be no issue whether state law adequately and independently precludes the application of what would otherwise be binding federal law. If, however, the Louisiana Supreme Court was wrong because the

---

6. Every cited decision finding *Long* jurisdiction has involved binding federal law, typically under a parallel, binding federal constitutional provision or under a binding federal statute. *See, e.g., Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 502-03 (2012) (state court decision "necessarily depended upon a rejection of the federal claim"); *Florida v. Powell*, 559 U.S. 50, 56-59 (2010) (state decision rested on interpretation of "what *Miranda* demands").

federal *Teague* exceptions *do* bind state collateral review courts, then this Court has jurisdiction over the *Miller* retroactivity issue in this case. Either way, the adequate and independent state ground prong has nothing to do with whether this Court's jurisdiction in this case extends to the *Miller* retroactivity issue.

5. Adopting "Montgomery" jurisdiction is particularly inappropriate in the collateral review context because it would narrow federal habeas review for state prisoners under the federal statute. *See* Opening Br. at 30-31. If this Court has "Montgomery" jurisdiction in this case, "*Teague* principles will control ... retroactivity ... on state collateral review and on federal habeas corpus review." United States Br. at 33. As the claim would be the same, the deferential standard of review in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") would apply: a federal habeas court could only grant relief where a state court's interpretation of *Teague* was "contrary to, or involved an *unreasonable* application of, *clearly established* Federal law." 28 U.S.C. § 2254(d)(1) (emphasis added). Consequently, state prisoners could obtain federal *de novo* review concerning a *Teague* exception *only* in the rare instance that this Court grants discretionary certiorari from a state court ruling. Moreover, States also could ask this Court to grant certiorari to vacate any state court decision that purportedly misreads non-binding federal precedents in *granting* a retroactive remedy. Indeed, obtaining that opportunity for States is the original reason that Respondent gave for supporting "Montgomery" jurisdiction. *See* Resp't's Br. in Opp'n to Pet. for Cert. at 4-6.

If, by contrast, the retroactivity of a new constitutional rule in a state collateral review court is not a federal issue, then federal habeas courts *must* assess retroactivity issues *de novo*, because the state courts would not have made any "'adjudica[tion] on the merits'" of any federal claim for retroactivity. *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (quoting 28 U.S.C. § 2254(d)); Opening Br. at 30-31. State prisoners will benefit far more often from having a mandatory *de novo* assessment of retroactivity in every federal habeas case, than from allowing prisoners *and* States to seek the rare grant of certiorari from this Court.[7]

6. The United States argues that "Montgomery" jurisdiction respects federalism and promotes comity by avoiding intrusive federal habeas litigation. United States Br. at 33-34. This exalts form over substance. Whether it comes from this Court or a subsequent federal habeas court, a federal court is nonetheless deciding whether a state prisoner must be re-sentenced or released. The name of the federal court is a distinction without a difference for comity concerns. Indeed, this Court has already rejected the argument that *Teague* requires uniformity between state court and federal retroactivity decisions, as such uniformity would undermine, rather than promote, federalism. *Danforth*, 552 U.S. at 280 ("Nonuniformity is, in fact, an unavoidable reality in a federalist system of government.").

---

7. Perhaps this explains why numerous *amici* such as the ACLU support Petitioner on retroactivity but are silent on the jurisdictional issues.

7. The United States is also wrong that the constitutional avoidance doctrine justifies creating "Montgomery" jurisdiction. United States Br. at 33. Never before has constitutional avoidance been used to *expand* this Court's limited appellate jurisdiction over state courts. Constitutional avoidance is used, *after* this Court has jurisdiction, to decide the merits on a non-constitutional basis (*e.g.*, statutory interpretation). *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600-01 (2012). It does not enable the Court to skip over its jurisdiction, much less to expand its jurisdiction broadly to a mass of new kinds of cases and issues.

Accordingly, this Court should decide whether the *Teague* exceptions are binding on state collateral review courts to avoid creating unbounded "Montgomery" jurisdiction. Resolving that issue will provide clarity not only for state courts, but also for federal habeas courts as to whether their assessments of retroactivity are *de novo* or deferential. *See supra*, at 12-13.

B. The *Teague* Exceptions Are Not Binding In State Collateral Review Proceedings.

The opening brief of the Court-Appointed *Amicus* raised and rebutted the four possible sources that could make the *Teague* exceptions binding in state collateral review proceedings of final convictions: (1) *Miller* itself, (2) a judge-created rule such as federal common law or "Reverse-Erie," (3) a federal statute, and (4) a judicially created implied remedy for constitutional violations. The parties and *amici* supporting jurisdiction have

championed only the last two of those four grounds.[8] This reply addresses these two arguments in turn.

1. Petitioner, unsupported by any *amicus*, argues that the *Teague* exceptions are made binding on state courts by 28 U.S.C. §§ 1257, 2241, and 2254. Pet. Br. at 37-39. Section 1257 limits this Court's appellate jurisdiction. *See supra*, at 4 & n.3. It certainly cannot make *other* federal statutes that apply only to federal courts also binding on state courts. Here, the other two federal statutes, §§ 2241 and 2254, go to this Court's almost-never-exercised *original* jurisdiction to hear habeas petitions from federal and state prisoners.[9] Neither statute imposes federal

---

8. No one argued that *Miller* itself federalizes retroactivity issues in state collateral review proceedings. Likewise, no one mentioned federal common law or "Reverse-Erie" as a basis to make the *Teague* exceptions binding on state collateral review courts. One *amicus* does cite inapposite Reverse-Erie cases. *See* CACL Br. at 20-22. This *amicus* ignores that *Johnson v. Fankell*, 520 U.S. 911 (1997), held that Reverse-Erie will not be used to require state courts to mimic the relief provided by federal courts under a federal statute that "simply does not apply in a nonfederal forum." *Id.* at 921. That fits this case precisely. *See* Opening Br. at 36.

9. Per 28 U.S.C. § 2241(b), this Court virtually always refers every original habeas petition filed in this Court to a federal district court. The Court's Rules state: "To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form *or from any other court. This writ is rarely granted.*" Sup. Ct. R. 20-4(a) (emphasis added). "This Court does not, absent exceptional circumstances, exercise its jurisdiction to issue writs of habeas corpus when an adequate remedy may be had in a lower federal court." *Dixon v. Thompson*, 429 U.S. 1080, 1080-81 (1977).

retroactivity requirements on state court collateral review proceedings. Accordingly, no federal statute provides a basis for making the *Teague* exceptions binding in state collateral review courts.

2. *Danforth* specifically rejected the dissent's argument that the Constitution makes *Teague* binding on state collateral review courts, and instead held that *Teague*'s standard comes from "the statute's command." *Danforth*, 552 U.S. at 278-79, 288, 290-91; *id.* at 301, 307-09 (Roberts, C.J., dissenting). *Danforth* held that "[s]ince *Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts." *Id.* at 278-79.[10] In state collateral review proceedings for final convictions, therefore, any retroactivity "a state court chooses to provide its citizens" is "a question of state law," "primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies." *Id.* at 288, 290-91.[11]

Even if the Court revisits the statutory rationale of *Danforth*, that rationale was correct. Because the federal habeas statute unquestionably provides state prisoners retroactivity remedies in federal habeas court, the only

---

10. *See also* United States Br. at 31 ("*Teague*'s framework was not formulated to govern state collateral review; it developed to interpret the federal habeas statute.").

11. The reliance of CACL's *amicus* brief (at 19 n.13) on "early retroactivity cases" before *Teague* is misplaced, because this Court "did not at the time distinguish between direct appeal and collateral review for purposes of retroactivity," *Danforth*, 552 U.S. at 296 n.1 (Roberts, C.J., dissenting).

constitutional question is whether this Court should create an additional, judicially implied remedy under the Constitution to require that state collateral review courts provide at least the same retroactivity remedy as federal habeas courts would. The answer is plain: where "Congress has provided what *it* considers adequate remedial mechanisms for constitutional violations[,]" this Court will not create an additional implied remedy for such constitutional violations. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (emphasis added). It is up to Congress—not the Court—to decide whether, as certain *amici* contend, the statutory limitation of federal habeas remedies to federal courts should be changed for policy reasons such as being "intrusi[ve,]" EJI Br. at 37, or a "waste of judicial resources," CACL Br. at 21 n.14.

Petitioner and various *amici* conflate the judicially implied remedy they seek with state court consideration of constitutional claims under 42 U.S.C. § 1983. *See, e.g.*, CACL Br. at 20-22. But this ignores two critical distinctions. First, § 1983 is an express remedy.

Second, beginning with the Habeas Corpus Act of 1867, the federal habeas statute has applied only to *federal* courts giving remedies to state prisoners. Ch. 28, 14 Stat. 385. In contrast, 42 U.S.C. § 1983, originally enacted in the Enforcement Act of 1871 (third act), has provided civil plaintiffs remedies enforceable in federal or state court. Ch. 22, 17 Stat. 13. Thus, the federal statutory habeas remedy for state prisoners is unlike § 1983 because the federal habeas statutory remedy applies in only federal courts.

Likewise, the EJI incorrectly relies on *Griffith v. Kentucky*, 479 U.S. 314 (1987). *See* EJI Br. at 34-35. The EJI omitted two critical words—"direct review"—from

its quote: "failure to apply a newly declared constitutional rule to criminal cases pending on *direct review* violates basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 321-22 (emphasis added). Accordingly, *Griffith v. Kentucky* did not overrule the statement in *Linkletter v. Walker* that "the Constitution neither prohibits nor requires retrospective effect" as applied to *collateral review* proceedings after convictions became final. *Linkletter*, 381 U.S. at 629; *see Danforth*, 552 U.S. at 297 (Roberts, C.J., dissenting) ("In *Griffith* ... we abandoned *Linkletter* as it applied to cases still on direct review.").

Similarly, although Justice Harlan in *Mackey* referred to the Constitution, he did so for guidance in exercising the statutory discretion provided by the federal habeas statute to make some new rules retroactive on federal collateral review, not because the Constitution itself requires retroactivity for those new rules. Justice Harlan's concurrence was rooted in "the purposes for which the writ of habeas corpus is made available," and "*not* the purpose of the new [constitutional] rule." *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring) (emphasis added). As Justice Harlan explained: "As regards cases coming here on collateral review, the problem of retroactivity is in truth none other than one of resettling the limits of the ... Great Writ ...." *Id.* at 701-02. As the *Teague* plurality later reiterated, "the Court *never* has defined the scope of the writ simply by reference to a *perceived need to assure* that an individual accused of a crime is afforded a trial free of *constitutional* error." *Teague*, 489 U.S. at 308 (brackets omitted) (emphasis added) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion)).[12]

---

12. No one disputes that in *Teague*, Justice White and Justice Brennan also expressly stated, without contradiction, their

Petitioner and its *amici* reprise the argument of the *Danforth* dissent, 552 U.S. at 303-10, that this Court's precedents on retroactivity in state actions for civil damages on direct review support making the *Teague* exceptions for final criminal convictions binding in state collateral review proceedings. *See* Pet. Br. at 47; EJI Br. at 29-35; CACL Br. at 12-13. *Danforth* already rejected this argument because of the difference between direct and collateral review. *See Danforth*, 552 U.S. at 284-88.

In particular, *Danforth* held that Justice Stevens's dissent in *American Trucking*, not the plurality, provided the more pertinent retroactivity analysis. *See* 552 U.S. at 286-87. As *Danforth* explained, Justice Stevens's retroactivity analysis in *American Trucking* was joined by four other justices in that case. *Id.* As *Danforth* further noted, *id.* at 287, *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), explicitly adopted the *American Trucking* dissent's direct versus collateral distinction. *See Harper*, 509 U.S. at 97 (new civil constitutional rules must be "given full retroactive effect in *all cases still open on direct review*") (emphasis added).

Quoting Justice Harlan, Justice Stevens's dissent in *American Trucking* had explained:

> The critical factor in determining when a new decisional rule should be applied to a

---

understanding that the *Teague* plurality's exceptions were an exercise "in construing the reach of the habeas corpus statutes." 489 U.S. at 317 (White, J., concurring in part and concurring in judgment); *see id.* at 332-33 (Brennan, J., dissenting) (referring to the *Teague* plurality's "reading" and "interpretation" of the "federal habeas statute").

> transaction consummated prior to the decision's announcement is ... the point at which the transaction has acquired such a degree of finality that the rights of the parties should be considered frozen.... [A]s in the criminal field the crucial moment is, for most cases, *the time when a conviction has become final*, see my *Desist* dissent, *supra*, so in the civil area that moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*.

496 U.S. at 215 (first emphasis added) (quoting *United States v. Donnelly*, 397 U.S. 286, 295-97 (1970)).[13] Of course, Petitioner's post-*Miller* case was brought for collateral review, not direct review.

At bottom, no one has explained how the Court can constitutionalize the *Teague* exceptions without overruling the rationale of *Danforth* that *Teague* is statutory, not constitutional. *See supra* at 16-17. That rationale leaves no principled basis to hold that *Teague* is statutory when

---

13. *Danforth* did quote the *American Trucking* plurality's statement that federal law "sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." 552 U.S. at 288. However, this came a sentence after noting *Griffith*'s holding that "a new constitutional holding" must be applied in "all cases still pending on direct review." *Id.* at 288 n.23. Accordingly, *Danforth* did not recognize any constitutional minimum retroactivity requirements for state collateral review courts for convictions that had become final before the new constitutional rule.

assessing whether federal retroactivity standards are a ceiling in state collateral review courts but constitutional when assessing whether they are a floor. *See Danforth*, 552 U.S. at 309-10 (Roberts, C.J., dissenting) ("I do not see any basis in the majority's logic for concluding that States are free to hold our decisions retroactive when we have held they are not, but not free to hold that they are not when we have held they are."). *Stare decisis* precludes inconsistency with *Danforth*'s rationale. *See Cty. of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring) ("As a general rule, the principle of *stare decisis* directs [this Court] to adhere not only to the holdings of [its] prior cases, but also to their explications of the governing rules of law.").

In all events, creating a judicially implied constitutional remedy for the *Teague* exceptions would hurt more state prisoners than it helps. As shown, *supra*, at 12-13, if the state collateral review courts are *not* required by federal law to apply the *Teague* exceptions, then federal habeas courts in cases brought by state prisoners will make *de novo* rulings on the retroactivity under federal law of a new constitutional rule, subject to full appellate review, including by this Court through its much broader appellate jurisdiction under 28 U.S.C. § 2254(a). In contrast, if state collateral review courts *are* required by federal law to apply the *Teague* exceptions, the only opportunity available to state prisoners for federal *de novo* review would be under this Court's discretionary, and rarely exercised, certiorari jurisdiction over state court decisions. *See supra*, at 12. Federal habeas court assessment of state-prisoner retroactivity claims would be limited to the deferential standard of review under AEDPA. *See supra*, at 12.

EJI argues that a future Congress "*could* ... limit or eliminate access to federal habeas for prisoners seeking retroactive application of new substantive rules." EJI Br. at 37 n.21 (emphasis added). This does not present a justiciable reason to imply a constitutional remedy now. This Court decides cases and controversies, not hypotheticals. If Congress ever were to limit or eliminate retroactivity in federal habeas proceedings brought by state prisoners, this Court could then decide whether such limitation is constitutional. Because that question is not presented *in this case*, it provides no basis to create a judicially implied constitutional remedy that requires state collateral review courts to mirror the *existing* retroactivity remedy under the *existing* federal habeas statute.

Finally, Petitioner and his *amici* ignore the uncertainty and burden for the judiciary that would be created under a judicially implied constitutional remedy. Numerous questions would arise, including whether the judicially implied constitutional remedy matched or was broader than the *Teague* exceptions, whether procedural limitations imposed under the federal habeas statute also limit the implied constitutional remedy, and whether federal prisoners also may assert the judicially implied constitutional remedy. Based on the Court's experiences with the judicially implied constitutional remedy under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), it is reasonable to expect that these and other questions would likely take many years to resolve. The Court should not engage in this new experiment in judicially implied constitutional remedies. *See* Opening Br. at 29.

CONCLUSION

The Court's jurisdiction in this case does not extend to deciding whether the Louisiana Supreme Court correctly refused to give retroactive effect to *Miller*.

Respectfully submitted,

STUART R. LOMBARDI
JONATHAN D. WAISNOR
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019

RICHARD D. BERNSTEIN
Counsel of Record
FRANK SCADUTO
JOANNE T. PEDONE
KYLE A. MATHEWS
WILLKIE FARR & GALLAGHER
1875 K Street, NW
Washington, DC 20006
(202) 303-1000
rbernstein@willkie.com

Counsel for Amicus Curiae

September 2015